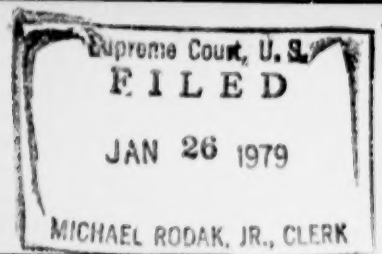


78-903

No. A-390



In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT T. EATON, doing business
as Eaton Construction,
Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
Respondent

and

NATIONAL STEEL PRODUCTS COMPANY,
a Texas Corporation, formerly
STRAN-STEEL CORPORATION,
Real Party in Interest

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF OF NATIONAL STEEL PRODUCTS COMPANY
IN OPPOSITION**

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OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for writ of mandamus is unreported but is printed as Petitioner's Appendix B. The opinion of the District Court is unreported but is printed as Petitioner's Appendix C.

(1)

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1978. A petition for rehearing was denied on August 10, 1978 (Pet. App. A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in denying the petition for writ of mandamus?

STATEMENT

In the District Court, petitioner sought to recover from National Steel Products Company on three separate causes of action. Count One was based upon breach of contract, Count Two was based upon tort and Count Three concerned alleged violations of the anti-trust laws. At the conclusion of petitioner's case, the District Court granted the motion of National Steel Products Company for directed verdict on Count Three, the anti-trust claim, and submitted the case to the jury on the claims for damages resulting from breach of contract and tort.

On December 21, 1976, the jury returned verdicts in favor of the petitioner upon the breach of contract and tort claims and assessed punitive damages on the tort claim. National Steel Products Company made a motion for a new trial upon the tort claim, and the District Court denied the motion upon the condition that the petitioner consent to a remittitur. The petitioner refused remittitur and the District Court granted a new trial upon the tort claim.

Petitioner then petitioned the United States Court of

Appeals for the Ninth Circuit for a writ of mandamus directing the District Court to reinstate the jury verdict. The Court of Appeals denied the petition on May 25, 1978 and denied the petition for rehearing on August 10, 1978.

ARGUMENT

1. Petitioner's contention (Pet. 5-6) that the District Court, in its order and opinion granting new trial or remittitur, mistakenly confined itself to considering actions of National Steel Products Company relating to the Havre and Missoula railroad jobs is incorrect.

After a detailed discussion of the evidence produced in support of Petitioner's claim for punitive damages (Pet. App. C-4 — C-10) the District Court concluded as follows:

"Accordingly, the only substantial basis upon which the jury could have awarded punitive damages is found in the defendant's interference with plaintiff's business relationships in connection with the Havre and Missoula railroad jobs. Is the award of \$350,000 then, outrageously disproportionate to the wrong done, or so large as to manifest an improper motive on the part of the jury?

"The court is firmly convinced from its review of the evidence that the award of punitive damages in this case is grossly excessive and outrageously disproportionate to the wrong done.

'When an award of exemplary damages is wholly out of proportion to the wrong done and its cause and it is so large that it cannot be accounted for on any other theory, the conclusion is inescapable that the award was measured by passion and prejudice of the jury. *Franck v. Hudson*, 140 Mont. 180, 373 P.2d 951, 954 (1962).'

"Although there was sufficient evidence to support an award of some punitive damages, the degree of maliciousness or oppressiveness was not so great as to justify an award of \$350,000. The jury may have been motivated by plaintiff's argument that he should be compensated for his loss of business, a matter which the court admonished the jury not to consider; or the jury may have been impressed by the fact that the defendant's parent company was the third largest steel producer in the United States, a factor which was irrelevant. *Herman v. Hess Oil Virgin Islands Corp.*, *supra*. If allowed to stand, this award would result in a miscarriage of justice." (Pet. App. C-10 — C-11)

Therefore, the District Court did not mistakenly confine itself to considering actions of National Steel Products Company relating to the Havre and Missoula railroad jobs and ignore Petitioner's evidence of "numerous activities on the part of National Steel Products Company showing wrongful interference with Petitioner's business and contractual relations". (Pet. 5) Instead, the District Court concluded that all evidence, except that relating to the Havre and Missoula railroad jobs, was either incompetent or insufficient to support the punitive damage award.

2. Petitioner's argument (Pet. 6) that the District Court erred in determining that the award of punitive damages was excessive when there was no evidence of the financial ability of National Steel Products Company to pay punitive damages misinterprets the conclusions of the District Court.

Petitioner cites language from a 1975 decision of the Ninth Circuit Court of Appeals¹ interpreting Montana law on punitive damages as follows (Pet. 7):

¹*Triton International v. Velco*, 525 F.2d 432

"The Montana statute §17-208, R.C.M. 1947, recognizes the right to award damages '... for the sake of example and by way of punishing the defendant'. The Montana courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong or situation or circumstances of the parties."

Petitioner then argues that the punitive damages cannot be considered excessive when there is no evidence of the financial ability of National Steel Products Company to pay. As clearly stated in the Ninth Circuit decision above, the circumstances of the parties (ability to pay) is only one of the grounds which may invalidate a punitive damage award. Such an award is also unjust if it is outrageously disproportionate to the *wrong* committed and if so, the financial position of the defendant is irrelevant. The District Court arrived at the specific conclusion that the award of punitive damages was grossly excessive and outrageously disproportionate to the wrong done (Pet. App. C-10) and no evidence of the financial ability of National Steel Products Company to pay punitive damages was necessary.

3. Petitioner's contention (Pet. 8) that the District Court violated the Seventh Amendment in re-examining the verdict and substituting its judgment for the jury in reducing the award of punitive damages is unsupportable.

While a district court may not arbitrarily reduce the amount of damages awarded, where damages clearly appear excessive the court may condition a denial of a motion for new trial upon the filing by the plaintiff of a

remittitur in a stated amount. In this way, the plaintiff is given the option of either submitting to a new trial or of accepting the amount of damages the court considered justified. Such a practice has been clearly sanctioned by long usage and accepted uncritically by this Court.

"If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial." *Linn v. United Plant Guard Workers*, (1966) 86 S.Ct. 657, 644, 383 U.S. 53, 65-66, 15 L.Ed.2d 582, 591.

4. By his petition for writ of mandamus, the petitioner is attempting to circumvent the "finality rule" and obtain review of an interlocutory order. While the courts clearly have broad mandamus power pursuant to the authority of 28 U.S.C. §1651², the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations³.

In a 1976 decision of this Court, *Kerr v. United States District Court*, 426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119, the petitioner had also petitioned the Court of Appeals for the Ninth Circuit to vacate an interlocutory order of a district court, which petition was denied. On certiorari, the United States Supreme Court affirmed the order of the Court of Appeals and in doing so stated as follows:

"As we have observed, the writ 'has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to its duty to do so."' *Will v. United*

²*La Buy v. Howes Leather Co.*, (1957) 352 U.S. 249; *Schlagenhauf v. Holder*, (1964) 379 U.S. 104.

³*Will v. United States*, (1967) 389 U.S. 90, 95, 19 L.Ed.2d 305, 88 Sup. Ct. 269.

States, supra, at 95, 19 L Ed 2d 305, 88 S Ct 269, quoting *Roche v Evaporated Milk Assn.* 319 US 21, 26, 87 L Ed 1185, 63 S Ct 938 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' *Will v United States, supra*, at 95, 19 L Ed 2d 305, 88 S Ct 269, the fact still remains that 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' *Ibid*.

"Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case 'have the unfortunate consequences of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him' in the underlying case." 426 U.S. 402

Having determined that the punitive damage award was grossly excessive and outrageously disproportionate to the wrong done, the District Court was under a duty to require a remittitur or a new trial. Proper observance of this duty cannot be challenged as a judicial "usurpation of power" and the Court of Appeals was correct in denying the petition for writ of mandamus.

CONCLUSION

This petition for writ of certiorari does not involve a federal question of substance nor has the Court of Appeals decided any important state or territorial question in conflict with applicable state or territorial law. The order of the Court of Appeals followed applicable decisions of this

Court and fully conformed to the accepted and usual course of judicial proceedings. Therefore, petitioner has presented no justification calling for an exercise of this Court's power of supervision and the petition for writ of certiorari should be denied.

Respectfully submitted,
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